

At the March 16, 2010, preliminary hearing, claimant requested (1) a referral to a podiatrist made by the authorized physician be honored as authorized medical care; (2) that he be evaluated by an ear, nose, and throat (ENT) specialist; and (3) that his authorized physician be authorized to treat his left elbow. In the April 12, 2010 Order, the ALJ ordered the respondent to send claimant to Dr. David Canter, who was selected by the authorized doctor, for evaluation and treatment. But the ALJ denied claimant's requests for the ENT evaluation and left elbow treatment as claimant had failed to prove those symptoms were related to his work-related injury.

Claimant contends the ALJ erred and, therefore, the preliminary hearing Order should be reversed. Claimant maintains the evidence is uncontradicted that he fell as a result of his weakened left ankle and injured his left elbow. He also argues the evidence is uncontradicted that he began having difficulties swallowing immediately following his right elbow surgery and that his medical expert, Dr. Pedro Murati, related the swallowing problems to the surgery and recommended evaluation by an ENT.

Respondent argues claimant's throat was not injured during the right elbow surgery as the surgeon's records do not mention it. Likewise, respondent contends claimant did not fall and injure his left elbow as that incident is not recorded in contemporaneous medical records. Finally, respondent argues the Board does not have jurisdiction to review the preliminary hearing Order. In short, respondent requests the Board dismiss the appeal or affirm the preliminary hearing Order.

The only issues before the Board on this appeal are whether the Board has jurisdiction to review the preliminary hearing Order and whether claimant has established that his throat symptoms and left elbow symptoms are related to his December 2006 accident at work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

The respondent does not dispute that in December 2006 claimant sustained personal injury by accident that arose out of and in the course of his employment with respondent. Likewise, respondent does not challenge that claimant injured, among other things, his left ankle and right elbow in that accident.¹

Respondent referred claimant to Dr. Prince Chan for treatment of the right elbow. Dr. Chan first saw claimant in January 2009 for his right elbow and performed surgery on that elbow in June 2009. Claimant testified that he has had difficulty swallowing following that surgery. He testified, in part:

When I went in for surgery on my right elbow, when they put me under, they used a tube to go down my throat, and after I came out of surgery, I was complaining about it for close to three weeks and they told me 'cause of the fact that he stuck a tube down my throat, they were having problems sticking it down, and every time I tried to swallow or yawn or do anything, it hurt on the left side in the far back going

¹ Respondent's Brief at 1 (filed June 1, 2010).

down. And it was brought up numbers of times and I even told Dr. Chan about it and nothing was done.²

Dr. Chan's medical notes do not mention that problem was encountered during claimant's surgery or that claimant complained of his throat during his follow-up visits. The doctor released claimant in September 2009.

On October 28, 2009, claimant was evaluated at his attorney's request by Dr. Pedro A. Murati. Dr. Murati indicated claimant's problem swallowing was related to claimant's accident at work and he recommended an evaluation with an ENT.

Claimant testified that shortly after being evaluated by Dr. Murati he fell when his left³ ankle gave way. According to claimant, his fiancé witnessed the accident and pleaded with him to visit an emergency room. Claimant described his October 2009 fall, as follows:

I still have snapping and popping in my left ankle. The right one, from the very beginning I've mentioned that, also. Nothing has been done about that, even though it's been approved more than once. Dr. Fan has looked at the left one, and I can't remember if he's done any X rays on it, but it's still swelled, it's discolored. I've got cramps all the time. And in October of last year when I went for a walk with my dog, my ankle gave out, and when it gave out I went falling down on the left side, which I bruised my ribs, my shoulder, and I messed up my elbow.⁴

. . .

I was on the -- I was walking up on the curb, just got up off the curb, and I was up in a parkway area over where I live in College Hill, and I guess the ground isn't totally level. There's potholes, you know, in the ground and you can't really tell it 'cause of the grass area and --⁵

Claimant indicated he had experienced problems walking due to his ankles since his work-related accident. And Dr. John W. Fanning fused claimant's left ankle in May 2007 when he performed a triple arthrodesis.

Claimant indicated he did not seek immediate medical treatment following the October 2009 fall because he did not have the money. But claimant did advise Dr. John

² P.H. Trans. (Mar. 16, 2010) at 11-12.

³ *Id.* at 19.

⁴ *Id.* at 15-16.

⁵ *Id.* 17-18.

G. Fan of that fall at their next appointment in January 2010. Dr. Fan's January 27, 2010, office notes read, in part:

01/27/2010 – The patient returns to Clinic for followup with multiple complaints.

. . .

He fell during Halloween which caused severe left-sided lateral epicondyle area pain in the elbow area and his ankle pain is getting worse. He was evaluated by a foot specialist Dr. Fanning in Wichita and recommended surgery. At this time he prefers to avoid surgery. . . .

On physical examination, left-sided elbow lateral epicondyle significant tenderness to palpation. . . .⁶

Respondent has attacked claimant's credibility on the basis that the medical records do not establish that claimant complained to Dr. Chan about his problems swallowing. Moreover, respondent argues claimant should not be believed as he was obtaining prescriptions for medications simultaneously from both Dr. Fan (who was then treating his back and neck) and from Dr. Chan (who was then treating his right elbow). In addition, respondent points out that claimant did not immediately seek medical treatment following his alleged October 2009 fall. Accordingly, respondent argues that if the Board does have jurisdiction to review the preliminary hearing Order the Board should affirm that Order when considering the evidence "in a light most favorable to the prevailing party."⁷

The undersigned disagrees with respondent's analysis. First, the Board's review is *de novo*.

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented, and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.⁸

Next, the Board does have jurisdiction to review the issue of whether an injured worker's symptoms stem from a work-related accident as that issue is tantamount to whether a worker has sustained an injury that arises out of and in the course of employment.

⁶ *Id.*, Cl. Ex. 2 at 1 (Dr. Fan's Jan. 27, 2010 office note).

⁷ Respondent's Brief at 6 (filed June 1, 2010).

⁸ K.S.A. 2009 Supp. 44-555c(a).

The undersigned Board Member finds claimant's testimony has established a *prima facie* case that his swallowing problems are related to his right elbow surgery, which resulted due to his December 2006 accident. Accordingly, the present record establishes a direct relationship between claimant's throat problems and his accident at work. The fact that Dr. Chan's notes fail to mention claimant having swallowing problems is not fatal. Clearly, claimant had no control over what Dr. Chan included or excluded from his medical notes.

Likewise, the undersigned also finds claimant has established a *prima facie* case that his left elbow symptoms are directly related to his December 2006 accident. Claimant's testimony is uncontradicted that his left ankle gave out, causing him to fall and injure his left elbow. Claimant explained he did not seek immediate medical treatment as he did not have the money. That testimony is credible. Accordingly, the evidence at this juncture establishes that claimant's left elbow problems are a direct consequence of the December 2006 accident.

In summary, claimant has established there is a direct relationship between his swallowing problems and left elbow symptoms. Consequently, claimant is entitled to receive a medical evaluation and reasonably necessary medical treatment to address those conditions. The preliminary hearing Order should be modified and this claim remanded to address claimant's request for medical benefits.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁰

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes entered April 12, 2010, is modified as claimant is entitled to receive a medical evaluation and reasonably necessary medical treatment and benefits for both his swallowing problems and left elbow symptoms. Accordingly, this claim is remanded to the ALJ to address claimant's request for medical treatment in light of the above findings and conclusions.

⁹ K.S.A. 44-534a.

¹⁰ K.S.A. 2009 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of June 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge